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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Petition of the State of Ohio for	)	
Authority to Continue to	)	**PR Docket No. 94-109**
Regulate Commercial Mobile	)	
Radio Service	)	

To: The Commission

OPPOSITION OF NEW PAR TO THE PETITION FOR RECONSIDERATION FILED BY THE PUBLIC UTILITIES COMMISSION OF OHIO

New Par, by its attorneys, respectfully submits this Opposition to the Petition for Reconsideration filed by the Public Utilities Commission of Ohio ("PUCO") of the Federal Communications Commission's ("Commission") May 4, 1995 Report and Order denying Ohio's petition to continue its rate regulation authority ("May 4, 1995 Ohio Report and Order"). New Par moves the Commission to deny the PUCO's petition because (1) the delay sought by the PUCO is contrary to the expressed directive of Congress and (2) the rates charged by commercial mobile radio service ("CMRS") carriers cannot lawfully be regulated by the states by means of complaint proceedings.[1]

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[1] New Par, through partnerships or subsidiaries, is the nonwireline cellular service provider in 16 MSAs and RSAs in Ohio and therefore has standing as an interested party in this proceeding.

The petition for reconsideration asks the Commission to hold the record in this proceeding open for an indefinite period of time so that the PUCO can eventually submit the results of a complaint proceeding now pending before the PUCO[2] on the chance that the PUCO's decision may provide information relevant to the Commission's determinations in this proceeding. Petition at 3-4. The petition for reconsideration also asks the Commission to "indicate its willingness to accept such information" for the purpose of ruling on the demarcation between preempted rate regulation and retained state authority. Id. at 4. The PUCO seeks to avoid a fair and up-front determination of whether its exercise of jurisdiction over the pending complaint proceeding, in fact, constitutes preempted rate regulation. The petition for reconsideration is but a thinly disguised attempt to have the Commission implicitly endorse the PUCO's decision to proceed with the pending complaint proceeding, notwithstanding the fact that the pending proceeding seeks to regulate the rates charged by CMRS providers in Ohio. Accordingly, New Par requests that the Commission deny the PUCO's petition and clarify that any attempt by the PUCO to entertain complaint proceedings as a means to review or affect the rates charged by CMRS providers constitutes preempted rate regulation.

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[2] In the Matter of the Complaint of West Side Cellular, Inc. d/b/a/ Cellnet of Ohio, Inc., Case No. 93-1758-TP-CSS.

DISCUSSION

A. The Delay in Concluding This Action Sought by the PUCO Violates the Statutory Requirement That This Proceeding, Including any Reconsideration, Be Completed Before August 9, 1995.

The PUCO's request that the Commission hold the record in this case open so that the PUCO can supplement its petition with the results of the pending complaint case brought by Cellnet, an Ohio cellular reseller, against various facilities-based cellular providers in Ohio is a request beyond the Commission's authority to grant. The PUCO submitted its initial filing commencing this proceeding on August 9, 1994. Therefore, pursuant to the clear instructions contained in 47 U.S.C. § 332(c)(3)(B), the Commission must complete all action on the Ohio petition, including any reconsideration, no later than August 9, 1995. It is not possible for the Commission to acquiesce in the PUCO's request and still meet this statutory deadline. While the PUCO represents that it hopes to expedite the parties' presentation of the evidence in the pending Cellnet complaint case, the fact is that the complaint case was filed in October 1993 and discovery has not yet been completed. It is inconceivable, even absent the developments set forth below, that the PUCO will now be able to complete the Cellnet complaint case and offer its results to this Commission for consideration and disposition before the August 9, 1995 deadline.

Moreover, the question of the PUCO's jurisdiction to entertain the Cellnet complaint is presently the subject of an action pending in the United States District Court for the Southern District of Ohio brought by GTE Mobilnet of

Ohio LP and New Par. The PUCO has agreed to an order signed by the district court judge (copy attached as Exhibit A) that prevents the PUCO from issuing any further orders or conducting any further proceedings in the Cellnet case, pending the Court's ruling on the plaintiffs' motion for a preliminary injunction. While the PUCO acknowledges the existence of this action in a footnote in its petition, it neglects to point out that the precise issue pending before the federal district court is whether the PUCO's attempt to exercise jurisdiction over the Cellnet complaint constitutes rate regulation preempted by Section 332(c)(3)(A) of the Communications Act, as amended. The merits of this issue have been fully briefed by the parties, with Cellnet's full participation as an applicant for intervention. According to the schedule established by the district court, a decision on the motion for preliminary injunctive relief is thought to be imminent.

The imminent decision on the pending motion for preliminary injunctive relief will likely give the PUCO definitive guidance on the preemption question as it relates to the Cellnet action. In fact, the only reason why the PUCO would not receive a timely and definitive ruling from the federal district court on the merits of the preemption issue as it relates to the Cellnet complaint is that the PUCO asked the federal district court to abstain from adjudicating the merits of the preemption issue and to defer to the PUCO's own determination that the

Cellnet complaint case does not fall within the scope of Section 332(c)(3)(A) preemption.[3]

The PUCO's gamesmanship is apparent. The PUCO is attempting to avoid a definitive determination of the preemption issue by a federal district court, while at the same time telling this Commission it desires further guidance on this issue, but only after it has produced results in the pending complaint case. The PUCO is simply trying to stall a decision on the question of whether it has jurisdiction to proceed with the complaint until after it has completed the complaint case. It does not want to be told that its jurisdiction has been preempted until it has fully -- and unlawfully -- usurped and exhausted jurisdiction over the Cellnet case. The Commission should not condone or assist the PUCO's game and it cannot allow the PUCO to undermine the express congressional intent that this action, including any reconsideration, be completed by August 9, 1995.

B. The Commission Can Give the PUCO the Guidance It Claims To Need Without Further Delay.

The pending action before the United States District Court is a proper forum in which to definitively resolve the question of the PUCO's jurisdiction to

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[3] Abstention is not a matter of subject matter jurisdiction. States are free to waive the abstention doctrine and permit federal district courts to act even though abstention might otherwise be appropriate. Ohio Civil Rights Commission v. Dayton Christian Schools, 477 U.S. 619, 626 (1986). The PUCO's request for abstention in the pending federal action, therefore, cannot be reconciled with its professed need here for greater guidance on the question of its authority to entertain complaint proceedings involving rates.

proceed in the pending Cellnet complaint case. Nevertheless, the Commission may appropriately use this proceeding under Section 332(c)(3)(A) specifically to instruct the PUCO of its lack of jurisdiction, pursuant to Section 332(c)(3)(A), over complaint cases alleging that the rates charged by a facilities-based cellular provider are discriminatory or set below cost. Because the PUCO clearly lacks this jurisdiction, as recognized in the May 4, 1995 Ohio Report and Order, the Commission can give this guidance without further delay.

As the Commission notes at paragraph 28 of its May 4, 1995 Ohio Report and Order, the PUCO labors under the mistaken belief that it retains jurisdiction to determine through the use of complaint proceedings whether the rates charged by cellular facilities-based cellular carriers are unduly discriminatory, preferential to affiliates, or otherwise unreasonable. The PUCO contended in its original petition that, while it has lost the authority to engage in traditional rate setting, it may nevertheless continue to entertain complaint cases involving rates and may even make findings in such cases that the rates charged are discriminatory or anticompetitive. See "Statement of PUCO's Intention To Preserve its Right for Future Rate and Market Entry Regulation of CMRS," filed August 9, 1994 (hereinafter "PUCO Statement"), at 1-3. As a matter of state law, such findings could then become the basis for an action for damages in an Ohio court of common pleas.[4] The PUCO contends that such actions are not preempted by Section 332(c)(3)(A). PUCO Statement at 3.

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[4] Ohio Rev. Code § 4905.61.

In paragraph 43 of the May 4, 1995 Ohio Report and Order, the Commission advised the PUCO as to Ohio's retained jurisdiction over complaint cases:

> Ohio states that it presently exercises jurisdiction over cellular service providers and radio common carriers to ensure that wholesale rates are not below cost through its complaint authority. . . .[A]lthough Ohio may not prescribe, set, or fix rates in the future because it has lost its authority to regulate "the rates charged" for CMRS rates, it does not follow that its complaint authority under State law is entirely circumscribed. Complaint proceedings may concern carrier practices, separate and apart from their rates. In consequence, it is conceivable that matters might arise under state complaint procedures that relate to "customer billing information and practices and billing disputes and other consumer matters." We view the statutory "other terms and conditions" language as sufficiently flexible to permit Ohio to continue to conduct proceedings on complaints concerning such matters, to the extent that State law provides for such proceedings.

This response would seem sufficient to have put the PUCO on notice that complaint proceedings involving carrier practices not "separate and apart from their rates" are preempted. Section 332(c)(3)(A) makes absolutely no distinction between the jurisdiction to regulate retail versus wholesale rates. However, since the PUCO persists in its belief that there is no preemption, even though the gravamen of a complaint is the rates charged by cellular providers and even though the complaint asks the PUCO to find a cellular provider's rates to be unduly discriminatory or otherwise unreasonable, perhaps a more explicit

instruction is in order. Thus, if the Commission wants to put this issue to rest once and for all, it should not only deny the PUCO's request for reconsideration, but also affirmatively advise the PUCO that complaint cases based upon allegations concerning the rates charged by cellular licensees are preempted by Section 332(c)(3)(A) and cannot be justified under the "other [non-rate] terms and conditions of service" exception.

The PUCO argues that it would be "poor public policy for the FCC to cut off efforts by the states to adjudicate cellular complaints which address claims of discrimination." Petition at 3. Nonetheless, to the extent that such complaints concern allegations of rate discrimination, Congress has already made the only relevant public policy determination in Section 332(c)(3)(A). Congress has determined that the states' authority to regulate the rates charged by cellular providers should be preempted and the wisdom of that policy is not properly before this Commission or open to attack by the PUCO. Moreover, congressional preemption of the states' authority to regulate the rates charged by cellular providers clearly preempts the authority to regulate rates through complaint proceedings as well as the authority to fix rates through traditional rate

setting proceedings.[5]

CONCLUSION

For the foregoing reasons, New Par urges the Commission to deny the PUCO's petition for reconsideration. The PUCO's request that the record in this action be held open until it completes the complaint case brought by Cellnet is improper since Congress has directed that this action, including any reconsideration, be completed by August 9, 1995. The PUCO had ample opportunity to make the evidentiary showing required under Section 332(c)(3)(A) to establish a right to engage in rate regulation. It failed to do so, and has offered no new evidence or argument justifying its petition.

The petition for reconsideration not only seeks to improperly delay these proceedings, it also seeks the Commission's tacit approval of the PUCO's decision to entertain the Cellnet complaint case, notwithstanding the fact that the

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[5] See, e.g., Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578-79 (1981) (holding that where Congress has given a federal agency exclusive authority over "rate regulation, " a state is barred from adjusting rates in the form of an award of damages in a state law cause of action); Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) (state statute requiring public utilities to obtain approval of state public utilities commission before issuing long-term securities held to constitute preempted rate regulation); H.J. Inc. v. Northwestern Bell Telephone Co., 954 F.2d 485, 492-93 (8th Cir. 1992), cert. denied, 504 U.S. 957 (1992) (rejecting plaintiffs' contention that they were not asking "the court to engage in ratemaking activities" merely because they sought "damages due to [defendants'] alleged RICO violations"); Southern Union Co. v. FERC, 857 F.2d 812, 817-18 (D.C. Cir. 1988), cert. denied sub. nom., Consolidated Oil & Gas, Inc. v. FERC, 493 U.S. 1072 (1990) (state law action for negligent misrepresentation which sought damages was preempted by FERC's exclusive jurisdiction over interstate gas rates); Storer Cable Co. v. City of Montgomery Ala., 806 F. Supp. 1518 (M.D. Ala. 1992) (municipal ordinance which prohibited discriminatory and anticompetitive rates for the provision of cable television services was preempted rate regulation).

complaint therein is based upon allegations involving the rates charged by cellular providers in Ohio. The Commission has already advised the PUCO that its retained jurisdiction over complaint cases extends only to complaints about practices that are "separate and apart" from the rates charged. The Commission should not, therefore, condone the PUCO's efforts to exert jurisdiction over complaints alleging that the rates charged are unduly discriminatory, preferential to affiliates, or otherwise unreasonable. Rather, it should reconfirm that the PUCO's authority over such complaint proceedings is preempted by Section 332(c)(3)(A).

Respectfully submitted,

NEW PAR

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July 5, 1995

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

GTE MOBILNET OF OHIO, LP, et al.,	)	
	)	Case No. C2-95-401
Plaintiffs,	)	
	)	JUDGE SMITH
v.	)	(Magistrate Judge King)
	)	
DAVID W. JOHNSON, Commissioner, et al.,	)	
	)	
Defendants.	)	

AGREED ORDER

With the agreement and consent of the parties, expressed below, the Court orders as follows:

1. Pending a ruling by this Court on Plaintiffs' Motion for Preliminary Injunction, neither Defendants nor their agents or attorneys shall take any action to seek sanctions or penalties against Plaintiffs arising from the Public Utilities Commission of Ohio's April 13, 1995 Order in Case No. 93-1758-RC-CSS. If the Court denies the Motion for Preliminary Injunction, the deadline for compliance with the April 3, 1995 Order in Case No. 93-1758-RC-CSS shall be extended to five (5) business days after the date of this Court's ruling on the Motion for

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Preliminary Injunction, and Defendants shall not seek sanctions relative to the time period prior to the Court's ruling on the Motion for Preliminary Injunction.

2. Pending a ruling by this Court on Plaintiffs' Motion for Preliminary Injunction, the Defendants shall not issue any further orders or conduct further proceedings in Case No. 93-1758-RC-CSS, and the subpoenas issued on April 18, 1995, will be held in abeyance. Any discovery conducted in Case No. 93-1758-RC-CSS during the pendency of the Motion for Preliminary Injunction may not be used against Plaintiffs in further Commission proceedings in Case No. 93-1758-RC-CSS.

3. Counsel for Westside Cellular, d/b/a Cellnet, who filed a Motion for Intervention on April 18, 1995, shall be served with all pleadings, unless and until the Court denies the Motion to Intervene.

IT IS SO ORDERED this 27 day of April, 1995.

UNITED STATES DISTRICT JUDGE

AGREED AND APPROVED:

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CERTIFICATE OF SERVICE

I, Jay L. Birnbaum, do hereby certify that on this 5th day of July 1995, a copy of the foregoing Opposition of New Par was mailed by first-class U.S. Mail, postage prepaid, to the following:

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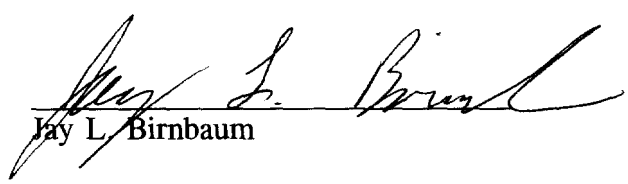

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